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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

**No. 255**

■

WALTER CHAPLINSKY, *Appellant,*

*v.*

STATE OF NEW HAMPSHIRE

■

APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

## APPELLANT'S BRIEF

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# UNITED STATES SUPREME COURT

OCTOBER TERM 1941

**No. 255**

WALTER CHAPLINSKY, *Appellant,*

*v.*

STATE OF NEW HAMPSHIRE, *Appellee*

APPEAL FROM NEW HAMPSHIRE SUPREME COURT

# APPELLANT'S BRIEF

## Opinions Below

The opinion of the Supreme Court of New Hampshire is not yet officially reported, but is unofficially reported in the Atlantic Reports, Volume 18, Second Series, Page 754. Record, p. 52.

## Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)], and under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466.

## Timeliness

The judgment of the Supreme Court of New Hampshire was entered on March 4, 1941. (Record page 64) The opinion of that court was delivered on the same date and appears in the Record, p. 52 *et seq.* The judgment of the Supreme Court of New Hampshire became final on March 4, 1941, the date of the opinion. The petition for appeal is filed and presented within ninety (90) days from such date to this Court and is therefore timely.

## The Statute

The statute, constitutionality and validity of which is here drawn in question, is Section 2 of Chapter 378, page 1470 of the Public Laws of the State of New Hampshire, reading as follows:

> "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in the street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, annoy, or offend him or prevent him from pursuing his lawful business or occupation." (R. p. 52, 65; Jurisdictional Statement pp. 23-35)

The Supreme Court of New Hampshire and the trial court held that the statute was not unconstitutional and that it did not abridge freedom of speech, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. That court sustained the statute's applicability and validity to appellant's conduct.

## Statement

The appellant, Walter Chaplinsky, on the afternoon of Saturday, April 6, 1940, was standing and walking back and forth on the sidewalk at the corner of North Main Street at

Central Square in the City of Rochester, New Hampshire. He was distributing and offering to distribute Biblical periodicals entitled "Watchtower", "Consolation" and others, and announcing his pamphlets as his means of preaching the gospel. Appellant is an ordained minister of Jehovah God and is one of Jehovah's witnesses possessing credentials attesting to such fact.

While appellant was thus engaged in his work, a mob formed around him on the sidewalk, a tumultuous crowd of about fifty or sixty persons objected to his work and threatened him with violence if he did not discontinue. While the crowd was still around him, City Marshal Bowering, accompanied by a man named Bowman, came through the crowd and accosted appellant, and Bowman assaulted the appellant, catching him by the throat with his left hand and struck at him with his right fist, whereupon appellant wrenched himself free and turned to Marshal Bowering and said, "Marshal, I want you to arrest this man," and Bowering answered, "I will if I feel like it."

The Marshal walked away with Bowman and the appellant continued his work of offering the magazines containing the message of God's Kingdom for distribution on the sidewalk. In about four or five minutes appellant looked down South Main Street and saw Bowman coming rapidly down the street with a staff and flag in his hand, with the staff pointed towards appellant. As Bowman came within about ten feet of appellant, he made a terrific lunge at appellant with the flagstaff as a spear in an effort to plunge the flagstaff through appellant, who avoided the blow, but was pushed by Bowman into the gutter against an automobile as he passed appellant. Bowman then walked to the corner and gave the flag to another man and came back toward appellant and caught him by the collar and said, "You son of a bitch—." Bowman then asked the appellant, "Will you salute the flag?"

The Marshal, Officer Lapierre and two others picked him

up from the ground and started him along Wakefield Street toward the City Hall, shoving him along roughly. While so doing, the appellant turned to the Marshal and asked, "Will you please arrest the ones who started this fight?" and the Marshal replied, "Shut up, you damn bastard, and come along," whereupon appellant said to him, "You are a damn Fascist and a racketeer." R. 44.

Marshal Bowering testified that appellant called him "a God-damn racketeer, a damn Fascist". R. 12.

While being shoved and dragged by the officers to City Hall along Wakefield Street in a rough manner, appellant recognized among the officers escorting him one of the men who had struck him and appellant asked him, "Who are you?" and the man replied, "I am a Deputy Sheriff." Appellant said, "If you are a Deputy Sheriff this whole city officials of Rochester are Fascists." As they entered the City Hall, the man who identified himself as a Deputy Sheriff named Ralph Dunlap said to the appellant, "You son of a bitch, we ought to have left you to that crowd there and have them kill you"; and Marshal Bowering shoved appellant down into a chair and said to appellant, "You unpatriotic dog, I am going to arrest you on account you called me a God-damned Fascist," to which appellant replied, "You are a liar, I did not call you a God-damned Fascist." Appellant testified he called him "a damn Fascist". R. 44.

However, even as to that, Marshal Bowering was not certain, because on cross-examination, he testified as follows:

> Q. Are you sure that the defendant said "You are a God damn Fascist and a racketeer"?
>
> A. No he said "You're a God damn racketeer and a Fascist" or damn Fascist, one or the other. Racketeer was first.
>
> Q. Are you absolutely certain that he used the word "God"?
>
> A. Absolutely. R. 20.

Q. And you're sure about the position of these words, "God damn Fascist"?

A. No, he said racketeer first and then Fascist, and afterwards he said the city officials were Fascists or agents of Fascists. R. 21.

All the State's witnesses uniformly testified that appellant called the marshal a God-damn racketeer and a damn Fascist. R. 6, 10, 12, 20, 22, 29.

Appellant was charged by warrant and complaint with a violation of the aforesaid statute in the municipal court of the City of Rochester, which complaint reads, among other things, as follows:

> "County of Strafford, aforesaid, with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'you are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names." R. 1.

He was convicted and duly appealed to the Superior Court. Thereafter his case was tried *de novo* in the Superior Court at Dover, New Hampshire, before a jury, which resulted in a verdict of guilty. Thereafter, the appellant was sentenced to six months in the State prison. R. 51.

At the close of the State's case and at the close of the entire case, in the trial in the Superior Court, the appellant filed motions to dismiss the complaint and for a directed verdict. (R. 32, 48, 51) These motions were overruled by the Court, to which rules the appellant duly excepted. R. 2-4, 51.

On November 13, 1940, bill of exceptions covering all of the points of law urged were duly presented to the trial

judge and allowed. The case was thereupon transferred to the Supreme Court of New Hampshire for determination. R. 1-4, 51.

The case was therefore timely appealed to the Supreme Court of New Hampshire. R. 51, 52.

## Federal Questions Presented

Substantial federal questions attacking the validity of the statute were raised in the Superior Court and also in the Supreme Court of New Hampshire. They were first raised by motion to quash, filed at the beginning of the trial, and for directed verdict, filed at the close of all the evidence.

The grounds for these motions were that the undisputed evidence showed that appellant was not guilty of the offense charged and that the statute in question is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because it denies freedom of speech.

Appellant also urged that the statute was unconstitutional because it is vague and indefinite and sets no reasonable standard of guilt, permitting a dragnet to be made thereof, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. R. 2, 3, 48, 51, 52.

These motions and grounds were overruled by the trial court and the validity of the statute was upheld. R. 32, 48, 51.

The Supreme Court of New Hampshire passed upon each of said federal questions attacking the validity of the statute on its face and as construed and applied and also held the statute valid and constitutional and overruled appellant's contentions. R. 52-64.

The Supreme Court of New Hampshire therefore sustained the conviction of the appellant and affirmed the judgment of the trial court, committing the appellant to the State prison for six months. R. 51, 52-64.

## Specification of Errors to Be Urged

Appellant assigns the following errors in the record and proceedings in said cause:

1. The Supreme Court of New Hampshire committed reversible error in failing to hold that the statute in question on its face and as construed and applied to appellant is invalid by reason of the fact that:

   a) It unreasonably and unlawfully abridges and denies appellant's right of freedom of speech, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

   b) It is vague, indefinite, too general, sets no reasonable standard of guilt and permits a dragnet, all contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

2. The Supreme Court of New Hampshire committed reversible error in failing to hold that appellant was entitled to introduce evidence of *provocation* for the use of the words spoken by him to Marshal Bowering and in failing to hold that the truth was justification and complete defense.

## Points for Argument

### POINT ONE

**Section 2 of Chapter 378 (page 1470) of the Public Laws of the State of New Hampshire, on its face and as construed and applied, violates the due process clause of the Fourteenth Amendment to the United States Constitution, because appellant is denied his right of freedom of speech, contrary thereto.**

### POINT TWO

**Section 2 of Chapter 378 (page 1470) of the Public Laws of the State of New Hampshire, on its face and as construed and applied, violates the due process clause of the Fourteenth Amendment to the United States Constitution, because it is vague, indefinite, too general, sets no reasonable standard of guilt and permits a dragnet, contrary thereto.**

### POINT THREE

**Evidence as to provocation is admissible as a defense to the offense charged, and if the words spoken are truthful it is complete justification and defense to the offense charged.**

# ARGUMENT

## POINT ONE

**Section 2 of Chapter 378 (page 1470) of the Public Laws of the State of New Hampshire, on its face and as construed and applied, violates the due process clause of the Fourteenth Amendment to the United States Constitution, because appellant is denied his right of freedom of speech, contrary thereto.**

It is now fundamentally established that freedom of speech is a right protected against state invasion under the due process clause of the Fourteenth Amendment.

De Jonge v. Oregon,
299 U. S. 353, 364

The undisputed evidence shows that appellant, immediately prior to his unlawful and unjustified arrest, and also during the time that he was unlawfully assaulted, was engaged in exercising his right of freedom to worship Almighty God and freedom of press, in distributing the "Watchtower" and "Consolation" magazines. He had done no wrong and had not acted in an offensive way whatsoever. The mob had gathered about him, with the knowledge and consent of the police, had threatened to get and did get an American flag, defilingly placed it before him and arbitrarily commanded him to salute it, and upon his refusal, he was assaulted and beaten.

He had every reason to expect police protection, but was given none. On the contrary, the police, without any reason whatsoever, jumped upon him and arrested him without excuse, woefully mistreating him, and when called upon by him to arrest the real law violators, dismissed the matter by

stating that such arrest would be made if it suited their fancy.

The appellant had the right to criticize the complaining witness as a public official openly acting in a wrongful manner, and also to criticize the local municipal government by the use of any language that he desired to employ as long as he did not induce or ask others to use violence against the local municipal government to overthrow the same. It is admitted by all that he did not attempt to overthrow the government, but was for good cause openly criticizing the local government and its agents, which he had a right to do.

Wrongful oppression openly practiced, as here, by citizens in the presence of and with the consent of public officials is rightly subject to open and prompt condemnation by the one against whom such wrongful acts are performed. Earnestly and in good faith this contention and the following argument appellant submits for unbiased consideration.

Appellant's use of the word "damned" is, in these circumstances, not a violation of the statute. Here the use of that word served only to emphasize, to arouse to a realization of the wrongfulness of the course then being pursued by those thus spoken to.

The question of whether or not the complaining witness was a *racketeer* is a matter of opinion which, under the evidence, was fitly and timely expressed. The evidence shows that the complaining witness, a public officer, openly permitted a mob to attack the appellant and when the appellant *rightly* attempted to defend himself, the complaining witness arrested him, beat and abused him. Let the Court ponder!

The only reason the mob gathered against the appellant and the only reason the appellant was arrested, was on account of the fact that he was one of Jehovah's witnesses distributing literature disliked by the complaining witness and mobsters. Let this be clearly and fittingly emphasized in the consideration of the appellant's position in the cir-

cumstances. Let it be borne in mind that at the time of the wrongful assault upon him he was upon a public street, where he had a right to be, and where he was lawfully doing in a peaceful manner that which he had a right to do, namely, imparting his views to others *in their interest*, as he sincerely believed. There is no showing that his *personal* deportment was noisy, truculent, overbearing or offensive. Appellant's right to distribute literature is guaranteed by the Constitution.

On the other hand, there is evidence that the complaining witness conspired with the mobsters in violation of Sections 51 and 52, Title 18, United States Code, to deprive the appellant of this right. One thus acting, in the opinion of the appellant, could be properly termed a "racketeer". Jehovah God has condemned racketeers and hence the expression "God damned", even *if*, as and when used in such circumstances, imports verity or constitutes a simple definition of fact. The right to use such definitive and descriptive language in a proper manner and time is guaranteed by the Constitution regardless of whether the one so described agreed or not.

This same argument applies to the words "damned Fascist", and the words "the whole government of Rochester are Fascists or agents of Fascists". Use of the word "Fascist" is not derisive, and does not accuse the complaining witness of being an Italian or a follower of Benito Mussolini. The word "Fascist" is now an English word which in common parlance means one who employs methods and acts in a manner so as to deprive another of his constitutionally secured rights, by misapplying laws or otherwise conspiring to deprive another of such rights, contrary to the Constitution and its fundamental principles of freedom.

The acts of the complaining witness and his mobster allies constituted "Fascist" action.

"Racketeer" is defined by Webster's *New International Dictionary*, Second Edition, Unabridged, 1935, as "one who

singly or in combination with others extorts money or *advantages* by threats of violence or of *unlawful interference* with business".

Marshal Bowering was manifestly working "hand in glove" with the mobsters and the ones assaulting the appellant. He winked at such miserable law violations and failed to enforce the law which had been openly violated by the mobsters in his presence and in plain sight. His failure thus to do constituted and was a conspiracy or combination with others to extort from him, or deprive appellant of, his rights, privileges and advantages enjoyed under the Constitution, by threats of violence and permitting others in such combination to carry out such threats of violence. He was guilty of unlawful interference with appellant's business. His failure to protect the appellant from injury and his unlawfully arresting the appellant and unlawful handling and abuse of the appellant constituted and were acts of a "racketeer" and a "Fascist", and such conduct rightly provoked the appellant to *express* righteous wrath.

The Marshal deceitfully acted with the wicked mobsters. "The wicked worketh a deceitful work."—Proverbs 11:18.

The Marshal had a scheme which he planned to use for selfish gain and to work to the injury of others, and that was to permit the appellant to be mobbed and if the appellant failed to run from the mobsters, then he would arrest him, as he did.

A "racketeer" therefore is a schemer, who is artful, wily and cunning and who uses his plan or scheme to gain advantage unfairly over others. The "racketeer" gains undue advantage over others and then uses his scheme or plan to rob or pillage others of their lawful and constitutionally secured rights. All "racketeers" are public enemies, and enemies of honest persons and enemies of God, and God has condemned "racketeers", and Fascists also.

Men who engage in traffic that is unlawful and works injury to the people are "racketeers" and public enemies. All

such public enemies either put the people in fear or fraudulently overreach them. Men who engage in political schemes to misrepresent the facts in order to induce the people to support them that they may reap a personal or pecuniary gain are "racketeers" and public enemies, or any who curry favor with lawless elements for reasons of "popularity" put themselves in the "racketeer" class.

Marshal Bowering, by his conduct, therefore laid himself open to the charge made by the appellant and was guilty as charged.

In arresting and prosecuting the appellant, Bowering 'framed mischief by law' as prophesied of such persons in Psalm 94:20.

It is to be noted that the statute prohibits the use of "offensive and annoying words" to another on the street or in a public place with *intent* to annoy or offend him, and such statute is not confined to slanderous and libelous statements but extends to prohibit one from speaking *the truth* in the presence of another. Webster defines the words of this statute as follows:

> *Derisive*—Expressing, serving for, or characterized by derision. Derision—to scornfully deride, act of deriding, contempt.
>
> *Annoying*—That annoys; molesting, vexatious.
>
> *Offensive*—Making attack; pertinent to, or characterized by, offense or attack, assailant; aggressive: hence, fitted for, or used in, attacking.
>
> Giving pain or unpleasant sensations; obnoxious; revolting; as an offensive smell; offensive sound.
>
> Giving offense, causing, or such as to cause, displeasure, or resentment; insulting; as offensive words.
>
> Obs. *a*) causing injury or damage; harmful, injurious; *b*) of the nature of an offense, sin or transgression; offending or tending to offend; transgressive; *c*) productive of spiritual stumbling.

Attention of the Court is drawn here to the fact that it is a fundamental proposition that if a statute, constitutional on its face, is applied to deprive and interfere with constitutionally secured rights, such as the undisputed evidence shows the appellant was exercising at the time of his arrest, then such statute becomes invalid.

What do the words mean when surrounded by the terminology of the statute?

When is one guilty under this statute by the use of such words?

The words are so broad that they include almost any word. The *manner* of saying "Hello" may fall into that category. The *manner* of criticism of any act of a government official, criticism of an actor's performance in the theater, criticism of almost anything, might be offensive, annoying, or derisive; at least to the person to whom the remark, name, noise, or exclamation is addressed. If the criticism is written and handed to another in the street the writer would be subject to prosecution under this statute. If one man on the street tells another that he doesn't like him, or tells a "New Dealer" that the "New Deal" is ruining the nation, swallowing up the Democratic party and destroying the Republican party and that he doesn't think Roosevelt should have been re-elected for a third term; or tells a policeman that the police officials of the city are inefficient, he may be and could be prosecuted and convicted under this statute, and everyone admits that such interference is prohibited by the Constitution. Everything depends on how one says a thing and how the person to whom it is said takes it or interprets it, under this statute. Thus it becomes a dragnet enforceable at the whim of individuals.

The descriptive words of the statute are so broad that they would permit an enforcement of the statute to curb, suppress and censor honest criticism of government, religion, politics, social functions, or any other subject.

*The statute covers equally lawful and unlawful words and conduct and makes no distinction.*

*It does not confine itself to immoral, indecent, obscene, or profane words.* ITS DEFECTS IN THESE RESPECTS MAKES IT UNCONSTITUTIONAL.

*It* PREVENTS *free communication of thoughts, ideas, information, and opinion merely because such might offend, annoy, or deride another.*

It is to be noted that the New Hampshire Supreme Court admits that the statute prohibits even truthful utterances, which shows that it has been *rightly* construed as *prohibiting* (and that *wrongfully*) freedom of speech.

The New Hampshire Supreme Court further held, however, that the evidence of provocation and justification was inadmissible. We have made complaint against the action of the courts below in holding that provocation and justification for the use of the words in question were inadmissible.

A statute which makes one guilty of an offense even though the challenged utterance be clearly justifiable is in derogation of the right of speech. The New Hampshire Supreme Court says that speech is limited to words that would directly tend to cause violence. That court said:

> " . . . to the extent that no words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."

The fact that speech is likely to cause violence is no ground for suppressing. This American rule is well expressed in the case of *Dearborn Publishing Co.* v. *Fitzgerald*, 271 F. 479, where it was said:

> "If it be assumed that the article might tend to excite others to breaches of the peace the reply is plain. It is the duty of all officials charged with preserving order and peace to suppress firmly and promptly all persons guilty of disturbing it, and not forbid innocent persons

> to exercise their lawful and equal rights. . . . If defendants' actions were sustained, the constitutional liberty of every citizen freely to speak, write and publish his sentiments on all subjects, being responsible only for abuse of that right, would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace and the right to a free press thus destroyed. . . . "

In *Whitney* v. *California,* 274 U. S. 357, this court, speaking through Mr. Justice Brandeis, said:

> "The fact that speech is likely to result in causing some violence . . . is not enough to justify its suppression."

We submit therefore that this statute is void on its face because it denies and deprives the appellant and all other persons of right of freedom of speech, contrary to the Fourteenth Amendment.

This case is governed by the decisions of this Court in *De Jonge* v. *Oregon,* 299 U. S. 353, 362; *Stromberg* v. *California,* 283 U. S. 359, 367-368; *Carlson* v. *California,* 310 U. S. 106; *Thornhill* v. *Alabama,* 310 U. S. 88, in which latter case, this Court, speaking through Mr. Justice Murphy, said:

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil av rted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public edu-

cation that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States* v. *Carolene Products,* 304 U. S. 144, 152-153n. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider* v. *State,* 308 U. S. 147, 161, 162."

"The streets are natural and proper places for the dissemination of information and opinion," orally or otherwise. See *Schneider* v. *State,* supra; *Hague* v. *C. I. O.,* 307 U. S. 496; *Carlson* v. *California,* supra; *Hannan* v. *Haverhill,* 120 F. 2d 87.

Public Law, chapter 378, section 2, is not aimed at any inherent danger, in any and every word, exclamation, name or remark which may be addressed to another in a street or public place with intent to deride, offend, or annoy, or prevent him from pursuing his lawful business or occupation. Under the statute it is possible that a man may without intent to deride, offend, or annoy address profane language to another in the street. The individual to whom controversial political, social or economic speech is addressed may or may not take it in a proper light. Others in the vicinity may be offended to the extent that a breach of the peace may ensue. The statute is not specifically directed at any inherent, clear, or present danger of destruction to life or property; and when the interest that the statute seeks to protect is balanced against the interests of the individual and community in the rights of free speech, free press, and

free worship, it cannot be found to be warrantable. Under some circumstances profanity and personal abuse can be freely and rightly used without violating the statute.

The Supreme Court of New Hampshire takes the view that one cannot speak the truth or express an opinion publicly, if by doing so, violence might result from others hearing the speech. That opinion is based upon the importance and convenience of preserving desirable conditions. Although the intention might be good, the results are obviously bad and lead to the destruction of the liberties of the people. Conveniences do not justify the interference here practiced.

Convenience or expediency might justify interference with conduct in many instances, but cannot warrant interference with freedom of speech. Preservation of desirable conditions and conveniences yield to the preservation of freedom of speech. *Schneider* v. *State*, supra.

The construction placed upon the statute by the New Hampshire Supreme Court permits conviction for the exercise of the right of free speech even where there is no clear and present danger of violence or threatened violence or breach of the peace. Breach of the peace is not necessary in order to sustain a conviction. This Court has held that there must be a clear and present danger of destruction of life or property or breach of the peace. *Thornhill* v. *Alabama*, supra. This matter was well stated by Mr. Justice Holmes in the case of *Schenck* v. *United States*, 249 U. S. 47, 52, as follows:

> "The question in every case is whether words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."

The false reasoning of the Supreme Court of New Hampshire, if permitted to stand, would ultimately destroy free-

dom of speech in the United States. It would bar all political discussions, discussions on religion, commerce, finance or any subject that might be controversial. The statute is not limited to personal abuse or epithets addressed to another, but extends into the entire field of discussion. It prohibits one from uttering in a public place opinions or THE TRUTH.

The statute is therefore void on its face and invalid as it is applied because it denies and abridges appellant's right of freedom of speech contrary to the Fourteenth Amendment. For this reason the judgment of conviction should be set aside and the appellant discharged.

## POINT TWO

**Section 2 of Chapter 378 (page 1470) of the Public Laws of the State of New Hampshire, on its face and as construed and applied, violates the due process clause of the Fourteenth Amendment to the United States Constitution, because it is vague, indefinite, too general, sets no reasonable standard of guilt and permits a dragnet, contrary thereto.**

The statute is also violative of the due process clause of the Fourteenth Amendment because it is vague and indefinite and permits a dragnet.

The words "offensive, derisive, annoying", "deride, annoy, offend" and "prevent him from pursuing his lawful business or occupation" take on a very vague, indefinite and uncertain meaning as used in Public Law, chapter 378, section 2.

No man of ordinary intelligence can safely discern from this statute just what he can say, or what words he may use in addressing another in the street or other public place. *Almost anything* that is said can be taken to be derisive under this statute, depending upon the susceptibilities of the hearer. Strikers or pickets may use some word, express some

opinion which they had a right to say and which, even though said innocently and with good intention, can be interpreted by some as having been said with intent to prevent a man from pursuing his lawful business or occupation. For example, a picket may say to a salesman entering the store or establishment being picketed, "Don't sell A. He is unfair to labor." For such remark the spokesman may be and can be prosecuted and convicted under this statute.

This statute is attacked as being void on its face, for the reason that it is vague and indefinite and also because, on its face, it deprives every one of the right of freedom of speech, contrary to the Fourteenth Amendment.

As has been shown, the terminology as construed by the Supreme Court of New Hampshire is so vague and indefinite that it is difficult to say just what is meant. It gives ample leeway for those who may be in control so to enforce a statute like this with such arbitrary and harsh discrimination that all free discussion can be curtailed by fear of prosecution. The threat inherent in such arbitrary measures is equally as evil as the threat of license or censorship.

The test is whether a statute defining an offense is void for uncertainty—whether the language may apply not only to a particular act about which there can be little or no difference or opinion, but equally to other acts about which there may be radical differences, thereby devolving upon the court the exercise of arbitrary power of discriminating between the several classes of acts. *Czarra* v. *District of Columbia Med. Supervisors,* 25 App. (D. C.) 443.

The dividing line between what is lawful and what is unlawful cannot be left to conjecture. *United States* v. *Capital Traction Co.*, 34 App. (D. C.) 592.

In support of the contention that the statute is contrary to the Fourteenth Amendment because denying freedom of speech and personal liberty without due process of law, we refer to:

*Detroit Creamery, et al.* v. *Kinnan, et al.*,
264 F. 845
*Smith* v. *Cahoun*,
283 U. S. 564
*Connally* v. *General Constr. Co.*,
269 U. S. 391, 392
*Dials* v. *Commonwealth*,
192 Ky. 440; 233 S. W. 888

and *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, where enforcement of a Federal statute was voided because of the fact that the statute was too vague, indefinite and indeterminate. It was a statute prohibiting excess profits on necessaries. The Court cited the case of *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and *Weeds, Inc.* v. *United States*, 255 U. S. 109; and from the *Cohen Grocery* case quoted as follows:

> "Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes (by court and jury after the act) to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

See also *United States* v. *Brewer*, 139 U. S. 278; *Louisville & Nashville Ry. Co.* v. *Railroad Comm. of Tenn.*, 19 F. 679; *Louisville & Nashville Ry. Co.* v. *Commonwealth*, 99 Ky. 132, 35 S. W. 129.

This general principle was applied in *Ex parte Jackson*, 45 Ark. 158, 164, where the statute annulled made it a misdemeanor to "commit any act injurious to the public health or public morals, or to the perversion of public justice or the due administration of the laws".

The principle is clearly applicable here and the statute in question should be held void upon its face.

In *United States* v. *Ballard*, 12 F. Supp. 321, United States district Judge Hamilton, of the Western District of Kentucky, held unconstitutional the internal revenue law known as Section 275, Title 26 U. S. C. A., and made a very eloquent argument in our favor appearing at pages 324 through 326 of the opinion, a part of which is quoted as follows:

> "The crime must be created by the Act of Congress, alone, for the public are not required to look beyond the act in their endeavor to ascertain what is criminal, and the discretion of fixing what facts import criminality is exclusively that of the law makers as distinguished from the executive."

See also the case of *International Harvester Co.* v. *Commonwealth of Kentucky*, 234 U. S. 217, 221, in which Mr. Justice Holmes outlawed the anti-trust law of Kentucky, which made price-fixing *lawful*, unless for the purpose or with effect of fixing a price that was greater or less than the real value of the article.

In *Herndon* v. *Lowry*, 301 U. S. 242, the majority opinion by Mr. Justice Roberts states at p. 264, in reference to Georgia Penal Code, sec. 56 (Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection):

> "The statute sets no *reasonable standard of guilt*. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." [Italics added]

In *De Jonge* v. *Oregon*, supra, the statute in question (Any person who shall preside at or conduct or assist in conducting any assemblage of persons, of any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a

felony: Here the defendant spoke at a Communist meeting) was held to be so broad that it abridged the freedom of speech and of the press, and the right of peaceable assembly, and thus violated the due process clause of the Fourteenth Amendment.

In *Near* v. *Minnesota,* 283 U. S. 697, the Minnesota statute, Chap. 285, Sessions Laws of Minnesota 1925, provided:

> "Sec. 1. Any person who as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a *malicious, scandalous* and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined as provided in the act."

There the complaint charged the defendant with printing a malicious, scandalous and defamatory newspaper. There was no question that the columns referred to in the complaint were malicious, scandalous and defamatory. The defendant alleged that the statute was unconstitutional as it abridged the right of freedom of the press as guaranteed in the Fourteenth Amendment, and that therefore the complaint since it issued under an invalid statute was void. *The court held the statute to be invalid and void on its face,* as it abrjdged the right of freedom of the press.

In *Stromberg* v. *California,* 283 U. S. 359, the California Penal Code, sec. 403a, prohibited the display of the red flag "as a sign, symbol or emblem of opposition to organized government". The complaint charged that the defendant "did wilfully, unlawfully and feloniously display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government

and as an invitation and stimulus to anarchistic actions and as an aid to propaganda that is and was of a seditious character." There the defendant was found guilty. The court held the statute invalid under the Fourteenth Amendment of the Constitution of the United States because it was so vague and indefinite and ambiguous as to permit punishment for fair use of opportunity to advocate change of government, and that as such it was repugnant to the guarantee of liberty.

In *Lanzetta* v. *New Jersey,* 306 U. S. 451, the statute in question was Section 4, Chapter 155, New Jersey Laws of 1934. (Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State is declared to be a gangster provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute.) This Court held that the words "gang", "gangster," "known to be a member," and "any person not engaged in any lawful occupation" were so indefinite and ambiguous as to their meaning and as to the interpretation to be given that the statute constituted a violation of the due process clause of the Fourteenth Amendment and consequently was invalid on its face.

In *Atlantic Ref. Co.* v. *Trumbull* (1930 Conn.), 43 F. 2d 154, a statute prohibiting sale of lubricating oil not "equal to or better in quality" than certain government specifications was held invalid for indefiniteness.

Public Law, chapter 378, section 2, when compared with the cases cited certainly falls into the same classification. This statute in effect allows prosecution for the expression of opinion and criticism, on any matter of public concern as well as private. It affords opportunity for a complete and thorough dictatorial censorship which can be imposed at the will of the power in control. It constitutes a grave danger to democracy.

The "intent" limitation in Public Law, chapter 378, section 2, does not cure its defectiveness. In *Herndon* v. *Lowry*, supra, the intent which had to be shown could only be judged by the "dangerous tendency" of the words uttered. The court held that "dangerous tendency" and words of the statute attempting to set a reasonable standard of guilt were so vague and uncertain that a jury would be warranted in a guilty finding even though the defendant's act may not have any effect for ten, twenty or thirty years. "Dangerous tendency" was not limited. The statute was held invalid and void.

*Specification by an "intent" cannot cure vagueness and ambiguity.*

In *Herndon* v. *Lowry*, supra, the Georgia Penal Code, section 56, provided: "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." In invalidating that statute the Court (by Mr. Justice Roberts) said:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterance of a defined character must find its justification in a reasonable apprehension of danger to organized government. *The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the constitution.*" [Italics added]

See also *Thornhill* v. *Alabama*, supra, where Mr. Justice Murphy in dealing with a similar statute, said as follows:

> " . . . A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368; *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451."

It is therefore manifest that the statute is vague and indefinite, too general, amounts to a dragnet which may enmesh anyone who engages in a discussion displeasing to others. The statute sets no reasonable, ascertainable stand-

ard of guilt. It is so vague and indeterminate in its boundaries thus set to freedom of speech that it necessarily violates the due process clause of the Fourteenth Amendment.

For this reason the statute is void on its face, and as construed and applied, and the judgment should be reversed and the appellant discharged.

## POINT THREE

**Evidence as to provocation is admissible as a defense to the offense charged, and if the words spoken are truthful it is complete justification and defense to the offense charged.**

We make no extended argument under this point save and except to say that *the truth* if established should have been considered as a defense. It is manifest that according to the erroneous opinion of the New Hampshire Supreme Court, *the truth* is not a defense, that court saying: "The truth would be no justification."

The New Hampshire Supreme Court also erred in holding that evidence of provocation was not admissible. The *res gestae* has always been admissible in evidence on trial of any crime or the judicial determination of any transaction. The acts and conduct of Marshal Bowering and his omissions to perform his duty in the presence of the appellant were admissible evidence. See *Jones on Evidence in Civil Cases*, 4th ed., volume 1, pp. 240-242.

For the error in holding that *the truth* is not a complete defense to the offense charged, the judgment should be reversed and the cause remanded for a new trial.

Also for the error committed in holding that *res gestae* acts of the Marshal and others acting with him or in his presence were not admissible is also ground for reversal of the judgment, and for this reason the cause should be remanded for new trial.

## Conclusion

To permit this conviction to stand means the end of free speech and constitutional liberty in this country. Chaplinsky, the appellant, was engaged in a Godly and Christlike work, as an ordained minister of Jehovah God, peaceably and quietly standing on the sidewalk exhibiting literature to passers-by. Because the message contained in the pamphlets and magazines was not suitable to the rabble element of Rochester, including members of the police department, a mob formed and gathered about him, threatening him with violence unless he discontinued his work. He refused to discontinue his lawful and constitutionally guaranteed work, as well as refused to salute the flag, the staff of which had been wrongfully and unjustly used as a spear or javelin in assault against him. He violated no *American* law by thus refusing. He was, therefore, assaulted and beaten in the presence of public officers, one of whom actually participated in such maltreatment, and which officers subsequently arrested him.

Thus it is manifest that the real motive and reason for the arrest of the appellant, Chaplinsky, was the fact that he chose to obey Almighty God and preach the Gospel in spite of mob violence, following exactly in the footsteps of Jesus

Christ's faithful apostle Paul and God's faithful prophet Jeremiah.

Because Chaplinsky was not a coward, but boldly trusted in Jehovah God, Marshal Bowering saw fit to 'frame mischief by law' (Psalm 94:20), knowing that unless he *framed* Chaplinsky, he would be unable to stop his lawful activity.

Under all the facts and circumstances, Chaplinsky was justified in saying what he did say and such utterances were provoked by the police, one of whom participated in the mob.

For the reasons hereinbefore discussed, the judgment of the courts below should be reversed and the appellant discharged, or in the alternative, for procedural errors, the judgment should be reversed and the cause remanded for new trial.

Respectfully submitted,

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